Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

BETTY CRAWFORD
Petitioner,

v.

DONNA NEWKIRK-STEWART and LAWRENCE WELLS,
Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals committed legal error in concluding that Plaintiff's speech did not involve a matter of public concern, when it concerned the welfare of abused and neglected children, and public corruption; the Court of Appeals' conclusion that Plaintiff's speech involved merely a personal grievance being inconsistent with decisions in other Circuits and with the decisions of this Court?

2. Whether the Court of Appeals erred in concluding that Defendants were entitled to judgment notwithstanding the verdict on the factual issue of causation where a reasonable jury could conclude that Defendants retaliated against Plaintiff repeatedly after she made her First Amendment-protected statements?

PARTIES TO THE PROCEEDING

The Petitioner is Betty Crawford. The Respondents are Donna Newkirk-Stewart and Lawrence Wells.

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I. THE CASE PRESENTS AN IMPORTANT QUESTION OF LAW, TO-WIT: TO WHAT EXTENT A PUBLIC EMPLOYEE'S STATEMENTS INVOLVED MATTERS OF PUBLIC CONCERN WHERE THEY RELATED TO THE EFFECTIVENESS OF A GOVERNMENTAL AGENCY'S PERFORMANCE OF ITS PUBLIC FUNCTION, AND PUBLIC CORRUPTION AND WRONGDOING, EVEN THOUGH THE STATEMENTS HAD A PERSONNEL ASPECT; THE COURT OF APPEALS' CONCLUSION THAT PLAINTIFF'S SPEECH INVOLVED PURELY A PERSONAL OR PERSONNEL MATTER IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT 17

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Betty Crawford petitions as follows for a Writ of Certiorari to review the July 25, 1996 Opinion of the United States Court of Appeals for the Sixth Circuit (Appendix A), which reversed the judgment upon a jury verdict entered by the United States District Court for the Eastern District of Michigan on May 25, 1994 (Appendix D).

OPINIONS BELOW

Neither the judgment of the United States District Court for the Eastern District of Michigan (entered: 5/25/94), nor the Opinion of the United States Court of Appeals for the Sixth Circuit (No. 94-2384; filed: 7/25/96) is published.

JURISDICTION

This Petition seeks review of an Opinion entered by the United States Court of Appeals for the Sixth Circuit on July 25, 1996 (Appendix A). Petitioner (Betty Crawford) filed a Petition for Rehearing and Suggestion for Rehearing en banc on August 6, 1996, which the United States Court of Appeals for the Sixth Circuit denied on September 4, 1996 (Appendix B).

Betty Crawford seeks to invoke the jurisdiction of this Court to review the Opinion of the United States Court of Appeals for the Sixth Circuit pursuant to 28 USC Sec. 1254(1).

CONSTITUTION, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The case presents a First Amendment issue. The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Plaintiff's cause of action is founded upon the First Amendment, and is brought pursuant to 42 USC Sec. 1983 ("Civil action for deprivation of rights"), which provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. * * *

STATEMENT OF THE CASE

A. Procedural Posture:

This Petition for Writ of Certiorari arises from a complaint filed by Plaintiff-Petitioner, Betty Crawford, on September 11, 1992 in the United States District Court for the Eastern District of Michigan, seeking damages for violation of her right of free speech under the First Amendment to the United States Constitution, and asserting a claim under 42 USC Sec. 1983 (R.1, Complaint, ¶¶ 1-2, 26-30). The United States District Court had jurisdiction pursuant to 28 USC Secs. 1331 and 1343.

In her First Amended Complaint and Jury Demand (R.2; 9/23/92), Betty Crawford asserted that, on December 1, 1991, while in the capacity of a Michigan Department of Social Services Child Protective Services worker, she received a complaint from a local hospital that a child was suffering severe trauma from a parent's sexual abuse (R.2; p.2, ¶9). Wells and Newkirk-Stewart (Respondents and Defendants below) are department supervisory personnel. Id, ¶¶ 6-7. As a result of her investigation, Plaintiff became aware that her supervisor, Newkirk-Stewart, had closed the child's file in October of 1991 with an incomplete investigation of a December 21, 1990 complaint of credible evidence of abuse. Id, p.3, ¶9. Because of this and other problems with the unit in which Plaintiff worked, the staff drafted a letter, expressing concerns that those improprieties and their impact were negatively affecting the quality of protection available through the unit. Id, ¶10. Plaintiff further alleged that as a result of her activities, Defendants retaliated against her, by reassigning her to intake duty, and by, subsequently, imposing a 30-day suspension and permanent reassignment upon her. Id, pp. 4-5. Plaintiff asserted that the Defendants are liable under 42 USC Sec. 1983 for violating Plaintiff's right to exercise the freedom of speech

guaranteed by the First Amendment. Id, p.6, para. 30.[1]

The case went to trial before the Honorable Bernard A. Friedman, beginning May 11, 1994 (R.79; TR, 3/21/94). Defendants moved for judgment as a matter of law under Fed. R. Civ. P. 50. The District Judge denied the motion, finding that "there is a public aspect involved in" Plaintiff's speech (Appendix C; TR, 5/17/94, p.111). The jury returned a verdict in Plaintiff's favor on the First Amendment claim (Appendix F). The District court entered judgment upon that verdict on May 25, 1994. (Appendix D), and denied Defendants' post-trial motions (Appendix E).

Upon Respondents' appeal (Notice of Appeal filed: 12/5/94; R.73), the United States Court of Appeals for the Sixth Circuit reversed the District Court's judgment, and concluded that the District Court "incorrectly denied Defendants' Motion for Judgment as a matter of law" (Appendix A; filed: 7/25/96, p.5a). The Court of Appeals found that the "only speech that predated the alleged retaliation and arguably relates to a matter of public concern is Plaintiff's implicit reference to the Cassandra case at the December 1991 meeting." Id, Appendix p.4-5a. The Court of Appeals stated "that Plaintiff's offhand remark, made in the context of a meeting which focused primarily on staffing concerns internal to the agency, is sufficiently related to a matter of public concern to constitute protected speech," because, in the Court's view, "mere tangential references to political, social or other community concerns cannot bring internal grievances in the realm of protected speech." Id, Appendix p.5a. The Court of Appeals

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[1] Plaintiff's claim of a Michigan constitutional violation (R.2, p.7, Count II) was dismissed before trial (R.33; 10/22/93). The jury returned a verdict of no cause of action on Plaintiff's defamation claim against Defendant Newkirk-Stewart (R.54; 5/25/94; Appendix F). Defendants' pretrial motion to dismiss did not raise the issue whether Plaintiff's speech involved a matter of public concern (R.18; Motion to Dismiss; 7/16/93). The District Court denied the motion as to Plaintiff's Section 1983 claim against the Respondents, Newkirk-Stewart and Wells (R.33; 10/22/93).

also concluded that any statements made "after the commencement of retaliatory acts cannot form the basis for a claim of retaliation," under the First Amendment. Id; Appendix p.4a.

Plaintiff sought rehearing and filed a Suggestion for Rehearing en banc, by timely filing such a motion and suggestion on August 6, 1996. The United States Court of Appeals for the Sixth Circuit denied the motion and suggestion by Order filed on September 4, 1996 (Appendix B, p.7a).

STATEMENT OF FACTS

Plaintiff, born on November 15, 1947, has been employed with the Department of Social Services for over two decades (R. 79; TR. 5/11/94, 46-47). She became a children's protective services worker in June of 1976, in the Oakland County Department of Social Services, a branch of the State Department of Social Services. Id., 47-48. A CPS worker protects children by investigating allegations of abuse or neglect. Id., 48. As a CPS worker, Plaintiff handled "intake work" (initial telephone calls expressing a concern about a child being abused or neglected) on a rotational basis. Id., 49. She was also responsible for investigating such cases, making contact with the child and the parents. Id. If she determined that a case should be opened, she would conduct a further investigation, which might include counselling, referral to a community service organization, or in some cases, a petition to the juvenile court to intervene on behalf of the child. Id., 51. Plaintiff would handle between 10-60 open cases at any given time. Id., 53-54. She also wrote narratives on various open cases, consisting of a record of the dates of contact, the investigation, phone calls, and any other activities on the file, and appeared in court on her cases. Id., 54-56. Plaintiff was chosen to appear on a local television show as a representative of the Department in April or May of 1990. Id., 57.

In May of 1990, Defendant Newkirk-Stewart became Plaintiff's supervisor. Id., 57. Newkirk-Stewart reported to

Defendant, Lawrence Wells, who in turn reported to Virginia Williams, with the chain of command eventually ending with County Director Booker Dennis. Id., 57-58. Plaintiff's February, 1991 performance evaluation (Plaintiff's Exhibit 1; R. 86), written by Newkirk-Stewart, showed that out of 22 different performance rankings, Plaintiff received an "outstanding" rating in 17, and "above expectations" in the other 5. (TR. 5/11/94, 61-62). Of Plaintiff, Newkirk-Stewart wrote as follows (Plaintiff's Exhibit 1):

> Ms. Crawford exhibits a superior knowledge of the CPS Program and implements it accordingly to the clients she services. She is organized and manages her caseload well. She is aware of the Department's goals and expectations and consciously strives to meet them. Her adjustment to new supervision has been flawless and she has readily adhered to new procedures. As a veteran worker, she is quick to offer assistance and direction to new staff persons. She has a positive attitude which she maintains even when under stress. Ms. Crawford is highly respected by the community and court personnel for her knowledge and dedication to the CPS Program. She is a proven asset to the staff and DSS.

A few months after Newkirk-Stewart became the supervisor, Plaintiff began to have some concerns about the operation of the Department (TR. 5/11/94, 64). Toward the end of the year 1990, the unit in which Plaintiff worked lost one staff member who transferred out of the county. Id. Another worker was soon fired, resulting in a "staff shortage". Id., 65. By the end of July, 1991, the unit had shrunk from 10 to 6 CPS workers. Id., 65-66. The increased workload made it "impossible" for Plaintiff and the other remaining staff workers to keep up with all aspects of their jobs, which "might ultimately

result in our inability to protect the children". Id., 66.

On December 1, 1991, Plaintiff was doing intake work, on an "on-call" basis (a Sunday) when she received a call indicating that a 5-year-old child, "Cassandra", had been brought into a hospital with very serious injuries. Id., 67. The child died two days later. Id., 68. Plaintiff found that there was a previous case record involving the same child. Id., 68. Another staff worker, Mr. Mullen, who had since left on a disability leave, had opened the case and substantiated that the physical abuse had occurred. Id., 69. Nevertheless, the case had been closed subsequent to Mr. Mullen's departure. Id. (see also, Plaintiff's Exhibit 48-A). The document indicating that the file had been closed was signed by Defendants Newkirk-Stewart and Wells, who had conducted no further investigation (TR. 5/11/94, 70; 5/12/94, p.168). Plaintiff felt that if the case had been re-assigned to another worker, the story might have had a different ending, i.e., "the child might still be alive" (TR, 5/11/94, p.71). Plaintiff discussed the matter with Newkirk-Stewart. Id., 71. Newkirk-Stewart indicated to Plaintiff that since this was a case that would "potentially be highly public", she should place the file under an assumed name and put it in a file marked with the other name in Plaintiff's case drawer. Id., 73. Later, Plaintiff prepared a transfer summary and handed the file to Newkirk-Stewart, as the mother of the deceased child and her remaining child had moved to Macomb County, Michigan. Id., 74.

Plaintiff later had occasion to review the file after the transfer to Macomb County, and found that the form indicating closure of the file, signed by Newkirk-Stewart and Wells, was missing. Id., 79.

On December 19, 1991, Plaintiff and other staff members met with Mr. Dennis, Deputy Director Hall, Virginia Williams, Wells and Newkirk-Stewart, to express their concerns about how cases were being handled in their CPS unit. Id., 81. When asked what she said during the course of that meeting, Plaintiff testified:

> I expressed my concern over the high level of stress in the unit; that because of the backlog of paperwork and the fact that we were will shortstaffed, the amount of work coming in, that I was afraid that there may be another tragedy, another child dead or seriously injured because of the lack of proper resources that we had in that unit [Id, 81-83].

Defendant Wells and Newkirk attended the meeting. Id, 81. After the meeting, three temporary workers were assigned to help with the intake function only. Id., 83. This was insufficient to meet the concerns expressed at the meeting. Id., 84-85.

To make matters worse, in January of 1992, Newkirk-Stewart instituted a "corrective action plan", which caused all the staff members to again express concerns. The plan (see, Plaintiff's Exhibit 4) appeared punitive and very restrictive in its treatment of the CPS workers (TR. 5/11/94, 85-87). The staff wrote to Mr. Dennis:

> We request a meeting with you as soon as possible to discuss CPS issues at this district that involve a high level of stress and concern on the part of CPS workers and the union stewards. We do not want to discuss grievances or labor/management issues. We request that the district manager and the CPS supervisor not be present or informed of this meeting as we have a real fear of retaliation.
>
> On 3/12/92, Dr. Miller stated that one of the Department's goals is to strengthen children and families. Our efforts toward that goal are in jeopardy at this district, and we feel compelled to request that you meet with us as soon as possible.

[TR. 5/11/94, 88-89].

Plaintiff, whom the above letter identified as the staff's "contact" person, received a telephone call from Mr. Dennis, indicating that he would be willing to discuss the concerns of the workers with Hall and Virginia Williams prior to meeting with staff. Id., 92.

Shortly thereafter, Plaintiff began receiving criticism from Newkirk-Stewart, her supervisor, regarding Plaintiff's job performance. Id., 92-93. Newkirk-Stewart, on May 4, stated that Plaintiff had not met her job expectation to complete one narrative per day until she was completely caught up. Id., 93. Plaintiff explained that it had been an unusually busy week for court appearances, but this did not satisfy Newkirk-Stewart, who indicated that Plaintiff "was bordering on insubordination". Id., 94. Plaintiff further recalled speaking to Ms. Williams of her concerns:

> I told Ms. Williams that I had just been threatened by my supervisor with insubordination; that I felt it was extremely unfair; I was trying my best.
>
> I stated that the whole staff was under an extreme amount of stress because of the fact that we had been shortstaffed. We got behind. We couldn't get caught up. The work was -- there was too much work to ever get caught up and that I did not feel that my being threatened with insubordination was helping the matter.
>
> And I expressed my concern that this high level of stress was going to lead to another tragedy, another child dying, or being seriously injured, and I asked for her intervention.
>
> I asked her to speak to Ms. Newkirk and help

alleviate the stress to the whole unit [Id, 95].

On May 7, 1992, Plaintiff returned to her office to find three of her cases missing from her file drawer, and was told by Newkirk-Stewart that the latter would return them when she was through with them. Id., 96-97. Eventually, Plaintiff learned that the three cases were part of an audit instigated by Newkirk-Stewart. Plaintiff learned of this move on May 19, 1992. Id., 98. Newkirk-Stewart, on May 19, generally indicated to Plaintiff that she had "uncovered problems" with Plaintiff's caseload, and would be doing a complete audit of Plaintiff's files. Id., 99. Mr. Wells said that he was in agreement with Newkirk-Stewart, and that Plaintiff was to be removed from the on-call schedule and would be restricted to intake work. Id., 99.

The audit, which included the confiscation of Plaintiff's files, made it impossible for Plaintiff to continue on her cases. (TR. 5/12/94, R. 80, p. 4). Plaintiff was even disallowed the use of the file to take to court to respond to a motion to dismiss, contrary to previous office practice. Id., 5-8 (Plaintiff's Exhibit 16). Plaintiff had to obtain a subpoena to remove the file from the office to take it to court. (TR. 5/12/94, p. 7). On May 29, 1992, Newkirk-Stewart wrote Plaintiff that she would "remain on intake contact duties only until further notice", and would have no on-call duties. Id., 9. On June 5, 1992, Plaintiff was informed in writing by Newkirk-Stewart of an investigatory conference, and of allegations of falsification of agency records and gross neglect of duty. Id., 10 (Plaintiff's Exhibit 15).

Prior to the investigatory conference, Plaintiff talked to Mr. Fred Lawless, a State DSS Director, of her concern that there had appeared to be some tampering with the Cassandra files, that the situation was bad in the office, and there was a potential for a repeat of the same type of tragedy. (TR. 5/12/94, 11). Plaintiff testified:

> Q. What did you say to Mr. Lawless about the case?

A. That I was very concerned about the fact that there appeared to be some tampering with the files; that the situation was bad in the office; and there was a potential for a repeat of the same type of tragedy.

Q. How long had it been, at that point, that you had discovered certain documents missing from Cassandra's file?

A. Just about a week, little over a week.

Q. Any understanding as to how Mr. Lawless happened to be contacting you?

A. Yes, he was contacted by his superior.

Q. Who was?

A. Ed Roth, Deputy Director of the Michigan State Department of Social Services.

Q. The investigatory conference then took place after this conversation with Mr. Lawless?

A. Yes [Id, 11-12].

The investigatory conference was held on June 8, 1992, and provided Plaintiff's first specific explanation of the accusations of falsification of records and gross neglect of duty. Id., 13-14. The alleged "falsification" consisted of the opening of two cases without face-to-face contact with the child or parent. Id., 14. Plaintiff explained that she had made several attempts to make such contact with the parent and the child, was unable to do so, and opened the cases to keep them going until she could catch up. Id., 14-15. This was consistent with the office unit's practice. Id., 15. If there was no basis to substantiate abuse or neglect, the records could be expunged and taken off the computer system later. Id., 17-18. In fact, Plaintiff had spoken with Newkirk-Stewart about these two

cases, and indicated that she was still concerned about the family, and that she was going to "pend them" for further investigation. Stewart said, "okay. She did not tell [Plaintiff] don't do this, this was falsification of records. She said okay." Id., 18. This was "a practice among many" CPS workers in the unit. Id., 18.

Plaintiff was also accused of "falsification" of records because some of her files, dating way back to 1989, had no "opening narratives." Id., 19. Plaintiff stated that she had completed the narratives, but "had no idea" why the file did not contain them. Id., 19.

Plaintiff had her husband contact the Attorney General's office on her behalf (Tr, 5/12/94, p.11). Plaintiff was then contacted by Fred Lawless, of the State Department of Social Services in Lansing, in late May, 1992, and was asked certain questions about the Cassandra case. Id, 11. Plaintiff told Lawless that she was very concerned about the fact that there appeared to be some tampering with the files; that the situation was bad in the office; and that there was a potential for a repeat of the same type of tragedy. Id. Lawless had been contacted by his superior, Mr. Ed Roth, the Deputy Director of the Michigan State Department of Social Services. Id, 12. The investigatory conference, concerning Plaintiff's alleged misconduct, took place after her conversation with Mr. Lawless. Id. Lawless had been prompted to contact Plaintiff by the Attorney General's office. Id, 98.

With regard to the allegation of "gross neglect of duty", Newkirk-Stewart told Plaintiff that there were cases in which she did not have monthly contacts or enough contacts with the family after the initial opening. Id., 20-21. Plaintiff explained that she "would have liked to have done more", but there were so many new cases coming in that she simply did not have the time. Id., 21.

Plaintiff was scheduled for a further disciplinary conference on June 12, 1992, with respect to the same charges. Id., 22-23. The contemplated discipline was "suspension". Id., 23. Plaintiff was informed at that conference that she was to be

suspended for 30 work days and would be transferred out of the unit; Wells concurred. Id., 23. That same day, June 12, 1992, Newkirk-Stewart escorted Plaintiff to her desk and gave her 30 minutes to pack up her belongings and leave the building. Id., 24. Newkirk-Stewart would not let anyone assist Plaintiff in the cleaning out of her desk, and was "standing over [Plaintiff] going through papers [she] was trying to put in boxes". Id., 25.

Plaintiff felt that the whole disciplinary episode was "totally unfair", that she had "never worked harder as a protective service worker", that she had "a spotless record up to this point", and "that this was based purely on retaliation and not on a fair assessment of [her] work". Id., 25. Plaintiff had never been disciplined before. Id., 25. Many of her co-workers "were in tears" at the moment of her departure, and tried to assist her, but Newkirk-Stewart sent them all back to their work stations, stating that Plaintiff "didn't need any help". Id., 26.

Plaintiff was transferred to adult community placement service duties, supervising adult foster care group homes. Id., 27. This resulted in a decrease in her compensation by $8,000 to $9,000 annually. Id., 27. Plaintiff remains in that job to this day. Id., 28. Plaintiff has received "outstanding" evaluations in her new position, as she always had in her former job. Id., 29.

Defendant Newkirk-Stewart stated that of the original ten CPS workers who were in the unit when she began as supervisor, only two remained when she left. (R.81, TR, 5/13/94, 8-9). The turnover left the staff rather shorthanded, because the State had a hiring freeze at the time. Id., 9-10.

Newkirk-Stewart was present at the meeting in December of 1991 when various issues involving staffing were discussed. Id., 11. She had just learned about the Cassandra case. Id., 11-12. She knew that there had been a previous file in that case, which she and Wells had closed. Id., 12. Nothing had been done on the file after Mr. Mullen's finding in May of 1991. Id., 14-15. Newkirk-Stewart and Wells simply closed the file in October of that year, without attempting to contact the child or the mother. Id., 15, 18. There was no "face-to-face" contact

with the mother or the alleged perpetrator. Id., 18. Even though Newkirk-Stewart had accused Plaintiff of "falsification" of records by opening a file without a face-to-face contact, she had not made any such contact herself, nor had Mullen for that matter, yet Newkirk-Stewart said that Mullen had not falsified records by doing so. Id., 20. There had been articles in the local newspapers concerning the Cassandra case. Id., 26. Newkirk-Stewart admitted that she had access to the "Cassandra" file until it was transferred to Macomb County. Id., 28. Newkirk-Stewart claimed that Dennis never instructed her to remove documents from the Cassandra file. Id., 32. She was aware that Dennis had been asked by staff to meet with him in May of 1992. Id., 33. Newkirk-Stewart stated that she knew nothing about any missing documents from the Cassandra file, yet the copy of the file retained in Oakland County did not contain the closing document (signed by herself and Wells) either ("That closing document is not in this file"). Id., 74-75.

Newkirk-Stewart conceded that there are situations in which contact cannot be made with the parent or child and yet the case will remain open, within the unit's policy authority. Id., 51-52. Thus, although the written manual requires such contact, an exception could be made on a "case-by-case" basis (TR. 5/16/94, R. 82, 81-82). "Protective Services allows making judgment calls", Newkirk-Stewart stated. Id., 82.

Newkirk-Stewart complained that Plaintiff had spent a great deal time socializing with co-workers, but not a single piece of documentation in Defendants' possession so indicated. Id., 86.

Other workers who had complained about Newkirk-Stewart to Mr. Wells, or would otherwise express themselves on departmental matters, were disciplined as well, but the discipline was overturned in each instance by an arbitrator. These included Delores Velite; Mr. Mullen; and Karen Morgan-Graff. Id., 100-103 (see also, R.81, TR 5/13/94, 127-32).

Defendant Wells is the section manager in the District Four office unit of the Oakland County Department of Social Services. (R. 82; TR. 5/16/94, 105). He reviewed some of

Plaintiff's files as part of the "audit", with Newkirk-Stewart. Id., 106. This was contrary to his deposition testimony, in which he denied reviewing any of the files himself. Id., 106-107. Newkirk-Stewart recommended dismissal of Plaintiff. Id., 107. Wells admitted concurring in the performance evaluation of Plaintiff in February of 1991, and that he "thought she was a good worker". Id., 108-109. Before Newkirk-Stewart became supervisor, Wells had no reason to believe that Plaintiff was any more prone to complaining than any other employee in the unit. Id., 109. Wells knew that Betty Crawford was the contact person for the group of employees who wrote the memorandum to him in April of 1992. Id., 112. At that point, the staff was down to 6 workers from 10. Id., 113. This significantly affected their ability to get the job done. Id., 114. Wells admitted that if any worker had undergone an audit at that time, something wrong could have been found. Id., 114. Plaintiff had never been disciplined before. Id., 115-116. Wells admitted that he closed the file on the Cassandra case. Id., 116. After the child's death, Dennis indicated that he was not pleased with the way the case had been closed out. Id., 117. At his deposition, Wells testified that Dennis had made the decision to remove the document from the file. Id., 119. At trial, he retracted this version. Id., 118-120. Wells admitted that he had reached this retraction only after speaking with Mr. Dennis. Id., 120. Wells admitted that he had felt that Plaintiff should be fired. Id., 156. Wells also confirmed that he believed a supervisor can grant exceptions to the rules in the manual. Id., 159. Prior to April of 1992, Newkirk-Stewart had given no indication of displeasure with Plaintiff's performance. Id., 160.

Mr. Dennis, the DSS Director for Oakland County, testified that he is the highest ranking DSS official in the County, and that the Cassandra matter first came to his attention in December of 1991. Id., 167-168. He learned that the file had been closed by the individual Defendants, Newkirk-Stewart and Wells. Id., 169. Dennis denied that there was any discussion of removing documents from the file. Id., 171.

With respect to the memo Dennis received from Plaintiff

and others (Plaintiff's Exhibit 6), Dennis testified that the office where Plaintiff worked had a history of not achieving its expected results, "having a large number of cases", and that "was of a major concern to us and the central administration, as well as the district manager". (R. 82; TR. 5/16/94, 180). Dennis did not want a repeat "of the situation that occurred a few years ago in Kalamazoo County", when a director was ultimately removed from his position. Id., 184. It appears from Dennis' testimony that he wanted to remove Plaintiff from her CPS position and re-assign her somewhere else, but could not do so "without cause and justification" under the labor agreement. Id., 185. He had admitted that all of the DSS programs "draw a lot of attention", including children's services. Id., 190. He knew that Plaintiff had contacted the Attorney General's office. Id.

Dennis further testified that in the December, 1991 meeting, he would not "discuss labor management problems". (R. 83; TR. 5/17/94, p. 8). There were concerns raised at the staff meeting about the unit's ability to protect children. Id., 12-13. These problems were discussed from the standpoint that there were many more difficult cases coming in. Id., 48. Dennis admitted that child welfare and the protection of children from abuse and neglect constitute a matter of public concern:

> Q. Now, in that December, 1991 meeting, as I understand it, you made it clear that you did not want to discuss labor management issues or grievance issues?
>
> A. That's correct.
>
> Q. So the issues that the staff was discussing were not those types of issues.
>
> A. The issues that the staff were discussing were staffing and staff stress.
>
> Q. Staff shortage. They felt they were overloaded, felt they were under stress, those types of things?

A. Yes.

Q. Did they discuss those in the context of the impact that might have on their ability to handle cases?

A. They discussed it from the standpoint that we seemed to be getting a lot more difficult cases in CPS and, obviously, that was impacting on them individually as well as collectively.

Q. Now, you believe that child welfare and the protection of children from abuse and neglect is a matter of public concern, don't you?

A. Absolutely.

Q. And these issues on stress and staffing, to the extent that they relate to the ability of the Department of Social Services to do their job, is [sic] also a matter of public concern?

A. Yes [Id, 48-49].

ARGUMENT

I. THE CASE PRESENTS AN IMPORTANT QUESTION OF LAW, TO-WIT: TO WHAT EXTENT A PUBLIC EMPLOYEE'S STATEMENTS INVOLVED MATTERS OF PUBLIC CONCERN WHERE THEY RELATED TO THE EFFECTIVENESS OF A GOVERNMENTAL AGENCY'S PERFORMANCE OF ITS PUBLIC FUNCTION, AND PUBLIC CORRUPTION AND WRONGDOING, EVEN THOUGH THE STATEMENTS HAD A PERSONNEL ASPECT; THE COURT OF APPEALS'

CONCLUSION THAT PLAINTIFF'S SPEECH INVOLVED PURELY A PERSONAL OR PERSONNEL MATTER IS INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT

Both the District Court and Court of Appeals correctly observed that whether Plaintiff's speech is protected First Amendment activity is a question of law, while the question whether Defendant retaliated against Plaintiff for that activity is, where the evidence is mixed, a question of fact for the jury. Connick v. Myers, 461 US 138, 148, fn.7; 103 SCt 1684; 75 LEd 2d 708 (1983); see also, Tao v. Freeh, 27 F3d 635, 638-39 (DC Cir. 1994).

This Court has established the "unconstitutional conditions" doctrine, which holds that the government may not deny a benefit, including employment, to a person on a basis that infringes his constitutionally protected freedom of speech. Board of County Commissioners v. Umbehr, 518 US ___; 116 SCt ____; 135 LEd 2d 843, 851 (1996); citing, Perry v. Sindermann, 408 US 593, 597; 92 SCt 2694; 33 LEd 2d 570 (1972). Government workers are constitutionally protected from adverse action based on their public or private criticism of their employer's policies. Umbehr, 135 LEd 2d at 851; citing, Perry, supra; Mount Health City Board of Education v. Doyle, 429 US 274; 97 SCt 568; 50 LEd 2d 471 (1977); Givhan v. Western Line Consolidated School District, 439 US 410; 99 SCt 693; 58 LEd 619 (1979). "The First Amendment's guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern." Umbehr, 135 LEd 2d 843, 852; citing, Connick v. Myers, 461 US 138, 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the whole record." Connick, 461 US 138, 147-148. Employee expression is protected if it may be "fairly considered as relating to any matter

of political, social, or other concern of the community..." Id, 461 US at p.146.

In Givhan, the Plaintiff's speech occurred in "private encounters" between the Plaintiff and a school principal. 439 US 410, 412. This Court stated that its prior decisions "do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly," 439 US at p.414, and that "[n]either the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." Id, 415-416.

In Pickering v. Board of Education of Township High School District 205, 391 US 563, 571; 88 SCt 1731; 20 LEd 2d 811 (1968), this Court stated that "the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the school Board, cannot, in a society that leaves questions to popular vote, be taken as conclusive." In Pickering, the Plaintiff had issued an accusation "that too much money [was] being spent on athletics by the administrators of the school system." Id, 571. This Court has established that any adverse employment action of a substantial nature (including the suspension and punitive transfer which Defendants imposed upon Ms. Crawford here) is actionable under the freedom of expression theory. Rutan v. Republican Party of Illinois, 497 US 62; 110 SCt 2729; 111 LEd 2d 52 (1990).

The Court of Appeals' conclusion that Plaintiff's speech included statements regarding only "internal grievances", that is, that Plaintiff's speech consisted of an "off-hand remark" having only "tangential references to political, social or other community concerns" (Appendix A,p.5a) is absolutely untenable in light of the decisions of this Court, and the decisions of other United States Courts of Appeals. Most courts to consider such issues have concluded that even where the Plaintiff's speech has an internal, personnel aspect, it may relate to a matter of public

concern, where it involves the effective functioning of a governmental agency, or the agency's ability to perform its assigned duty.

The Court of Appeals' decision in this case is especially erroneous, because it has the effect of exonerating public officials who retaliated against Ms. Crawford when she spoke out about concerns involving the welfare of abused and neglected children, as well as about public corruption. The resulting, chilling effect upon public employees situated similarly to Ms. Crawford will only be to the detriment of the children that such departments are supposed to protect. Quite clearly, the protection of children from abuse and neglect is a matter of public concern, even where the issue is raised in the context of criticism of internal departmental policies and practices. To the extent that the United States Court of Appeals for the Sixth Circuit has departed from this approach in Ms. Crawford's case, it has placed itself at odds both with this Court and other United States Courts of Appeals.

Defendants, and the Court of Appeals, placed heavy reliance upon this Court's decision in Connick v. Myers, 461 US 138. But in that case, the speech at issue, for the most part, concerned matters arising out of a personal disagreement between the Plaintiff and his employers. The point was not that the speech was made within the employment setting. See, Givhan, supra. In fact, in Connick, this Court reiterated what it had held in Givhan, that "First Amendment protection applies when a public employee arranges to communicate privately with his employer rather than to express his views publicly." 461 US 138, 146. The point of Connick was that the character of the speech itself was not of "public concern" (for the most part) as judged by the content, form and context of the statements, as revealed by the whole record. 461 US, 147, 148.

State employees in the public health area have a First Amendment claim where they experience retaliation for reporting problems to their superiors concerning the level of services being provided by the agency which employs them. Rookard v. Health and Hospitals Corp., 710 F2d 41 (2d Cir.

1983); Frazer v. King, 873 F2d 820 (5th Cir. 1989). "While an individual personnel dispute does not generally constitute a matter of public concern...an employee's speech aimed at resolving a personnel dispute may touch upon an issue of public concern." Tao v. Freeh, 27 F3d 635, 639-40; citing, Connick v. Myers, 461 US, 148. Even if Plaintiff "had a personal stake in the controversy", that does not disqualify her speech from First Amendment protection, because such an approach would muzzle "an affected employee from speaking out." Tao, 27 F3d at 640 (citation omitted).

Ms. Crawford's speech did not relate to a personal grievance of her own (she had none at the time), but "clearly pertained to matters of important public concern", including her unit's ability to perform its important function, and the effect upon the welfare of children in Oakland County. Feldman v. Philadelphia Housing Authority, 43 F3d 823, 829 (3rd Cir. 1994). It is evident that the Defendants thought that Plaintiff's speech, and that of others, was "disruptive," but that is not the sort of "disruption" which the courts consider legitimate as a defense to a First Amendment claim. The evidence is simply not in this record which would disclose that Plaintiff's First Amendment interests were outweighed by the alleged effect upon the employer's need to run an efficient organization. Pickering v. Township High School District, 391 US 563, 568; Meyers v. Cincinnati, 934 F2d 726, 730 (6th Cir. 1991). The trial produced no evidence of any "adverse effect" upon "Plaintiff's relationship with [her] co-workers, nor of any adverse impact" upon the Department's operation. Id, 730. To the contrary, Plaintiff was attempting to foster the true role of the Department in such matters, and not to adversely affect the Department's ability to provide its needed services. As the Third Circuit has stated in Feldman, 43 F3d 823, 830:

> The First Amendment balancing test [of Pickering] can hardly be controlled by a finding that disruption did occur. An employee who accurately exposes rampant corruption in her

> office no doubt may disrupt and demoralize much of the office. But it would be absurd to uphold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office.

In this case, Plaintiff's speech did concern not only the effective functioning of the office, but misconduct as well. The Sixth Circuit, itself, has repeatedly held that speech disclosing public wrongdoing addresses a matter of public concern, and therefore, deserves constitutional protection. Williams v. Kentucky, 24 F3d 1526, 1535 (6th Cir. 1994); Solomon v. Royal Oak Township, 842 F2d 862, 865 (6th Cir. 1988). "The public interest is near its zenith when insuring that public organizations are being operated in accordance with the law." Marohnic v. Walker, 800 F2d 613, 616 (6th Cir. 1986); Connick v. Myers, 461 US 138, 149. Speech which discloses any evidence of corruption, impropriety or other misconduct by public employees "clearly concerns matters of public import." Conaway v. Smith, 853 F2d 789, 796 (10th Cir. 1988).

Mr. Dennis himself conceded that the matters raised by Plaintiff and others address matters of public concern. In addition to the mishandling of the Cassandra case, Plaintiff uncovered proof that the Defendants had removed documents from a file in order to attempt to hide their own culpability in the matter. Truly, this must be deemed to relate to a matter of public concern. Defendants had no "legitimate interest in covering up mismanagement or corruption and cannot justify retaliation...as a legitimate means of avoiding the disruption that necessarily accompanies such exposure." Johnson v. Multonmah County, 48 F3d 420, 427 (9th Cir. 1995). That Ms. Crawford's statements involved the operation of her governmental unit does not convert that speech into an unprotected "employee grievance." Johnson, at 425.

In the Court of Appeals, Defendants referred to this

Court's decision in Waters v. Churchill, 511 US __; 114 SCt 1878; 128 LEd 2d 686 (1994), but that decision actually favors Plaintiff's position in this case. In Waters, this Court addressed a situation in which it was unclear what the Plaintiff had actually said. The employer, after an investigation, concluded that the Plaintiff's speech was unprotected (relating only to individual complaints), while the Plaintiff maintained what she had actually said to her co-employee was protected speech about the hospital's "cross-training" policy which, Plaintiff felt, "threatened patient care because it was designed not to train nurses but to cover staff shortages..." 128 LEd 2d 686, 693. This Court held that the employer must proceed with the care that a reasonable employer would use when making a disciplinary decision and, in the course of making that decision, determining what the employee said. Id, 700-701.

In this case, there is no issue of fact concerning the content of Plaintiff's speech. Whether that speech is protected by the First Amendment is a question of law which the District Court resolved correctly in Plaintiff's favor. If anything, Waters demonstrates that the motivational issue is one of fact for the jury's resolution (see: Argument II, infra). Waters, 128 LEd 2d 686, 703. If the Plaintiff were accurate in her recollection of what she had said, and that speech concerned internal policies which affected the agency's ability to care for patients, the speech was constitutionally-protected. Ms. Crawford's speech should be considered, as a matter of law, First Amendment-protected as well, as it related to the Department's ability to care for children.

More recent decision of the various Courts of Appeals only accentuate the accuracy of Petitioner's argument. In Voigt v. Savell, 70 F3d 1552, 1560 (9th Cir. 1995), the Court could not "say" that the Plaintiff's speech, even though primarily concerned with internal personnel matters, was "of absolutely no relevance to the public's evaluation of the performance of the court system." By touching upon a matter of public concern, it attained protected status. Id.

In Kincade v. City of Blue Springs, the Defendants

contended that the Plaintiff's speech did not involve a matter of public concern because "Kincade made this speech as an employee, within the role and scope of the employer/employee relationship, and not as a concerned citizen." 64 F3d 389, 395 (8th Cir. 1995). The Court of Appeals rejected the argument, noting that the Plaintiff's speech involved, in part, the expense of public funds, and hence, was "of interest to the community and did not involve issues that were relevant only to the employees of the City." Id, 396 (emphasis added). Moreover, the Plaintiff's comments "clearly were not limited to matters of personal interest to him only." Id.

In Lambert v. Richard, 59 F3d 134, 136-37 (9th Cir. 1995), the Plaintiff told the City Council that the library (where she worked) was "barely" functioning, "and that employees who dealt regularly with the public were performing 'devoid of zest, with leaden hearts and wooden hands.'" The Court of Appeals held her speech protected, because the operation of a public library "is among the most visible of the functions performed by city governments." Id, 136.

Certainly, the protection of children through Departments of Social Services is also a visible, and important government function, one which is of obvious public concern -- by Defendants' admission at trial. As in Lambert, Ms. Crawford did not speak merely of "a petty personnel grievance," but of a matter of obvious public concern. 59 F3d at 137. Even if Ms. Crawford had mixed motives (personal and public) in making her speech (and there is no evidence to support that conclusion), the speech would be protected, as it more than touched upon a matter of public concern. Davis v. Ector County, Texas, 40 F3d 777, 782-83 (5th Cir. 1994). Ms. Crawford's speech, concerning the proper and effective performance of the Department's duties, "must be considered an issue of political or social concern." Fikes v. City of Daphne, 79 F3d 1079, 1084 (11th Cir. 1996); compare, Hom v. Squire, 81 F3d 969, 974 (10th Cir. 1996) (Plaintiff's speech "involved only matters of internal departmental affairs and personal interest" [emphasis added]); see, Watters v. Philadelphia, 55

F3d 886, 893 (3rd Cir. 1995) (speech concerning effective functioning of police officers protected by First Amendment).

The Court of Appeals' decision in Ms. Crawford's case presents a startling departure from the precedents of this Court and decisions of other Courts of Appeals. This decision has grave consequences for the public interest, furthermore, as it sends a message that it is permissible for public officials to retaliate against employees who speak out (albeit internally) against policies that jeopardize the safety of abused and neglected children and against public corruption. These Defendants neglected their duties and allowed a child to die of abuse, then tried to cover it up by removing documents from a public record. When Plaintiff complained, they retaliated against her, and sought to ruin her outstanding career and the reputation she had earned through years of dedicated public service. The trial testimony, moreover, established a pattern of retaliation by the Defendants against employees who spoke out about their concerns (R.81, TR 5/13/94, 128-132. The Defendants retain their positions with the State, and have received no punishment or prosecution for their misconduct. Anyone who critizes this "system," like Ms. Crawford, is punished. If this Court denies Ms. Crawford's petition, it is unlikely anyone will dare speak out again.

The Court of Appeals' decision could only have been reached upon a distortion of what the record holds, insofar as Defendants' actions toward Plaintiff are concerned, and the timing of the retaliation in relation to Plaintiff's speech. This aspect of the Court of Appeals' decision forms the focus of Petitioner's second argument.

II. THE SIXTH CIRCUIT ALSO ERRED BY CONCLUDING THAT DEFENDANTS WERE ENTITLED TO A DIRECTED VERDICT ON THE ISSUE WHETHER PLAINTIFF'S FIRST AMENDMENT-PROTECTED STATEMENTS WERE THE CAUSE OF DEFENDANT'S MISTREATMENT OF HER

In this type of case, the employee "must prove that the conduct at issue is constitutionally protected, and that it was a substantial or motivating factor" in the treatment of the Plaintiff by the Defendant employer. Umbehr, 135 LEd 2d 843, 852. "If the employee discharges that burden, the government can escape liability by showing that it would have taken the same action even in the absence of the protected conduct." Mount Health City School District, 429 US 274, 287. Circumstantial evidence may suffice to establish the unconstitutional motive, under the Sixth Circuit United States Court of Appeals' own precedents. Conklin v. Lovely, 844 F2d 543, 546-47 (6th Cir. 1987). In this case, Plaintiff had a spotless work record until her First Amendment activity began -- very similar to the Sixth Circuit's own decision in Meyers v. Cincinnati, 934 F2d 726, 729 (1991). Defendants did not show to an extent beyond a reasonable jury's disagreement "that [they] would have reached the same decision" as to Plaintiff's employment status "even in the absence of the protected conduct." Board of Education v. PICO, 457 US 853, 870; 102 SCt 2799; 73 LEd 2d 435 (1982). As in Meyers, and Ratliff v. Wellington Exempted Village Schools, 820 F2d 792 (6th Cir. 1987), "the change in the attitudes and actions of the Defendants before and after the speech in question is too compelling to ignore." Meyers, 729. Consider the timing of the actions taken by Defendants in relation to Plaintiff's protected speech:

> February 19, 1991: Newkirk and Wells issue outstanding performance evaluation to Plaintiff.
>
> December 19, 1991: Meeting with staff and management regarding concerns about the Department's ability to adequately respond to abuse and neglect cases.
>
> January 27, 1992: Newkirk issued "Corrective Action Plan" to staff.
>
> April 29, 1992: Memo from CPS staff to

Dennis listing Plaintiff as contact person.

May 4, 1992: Plaintiff's meeting with District Manager.

May 7, 1992: Newkirk begins pulling Plaintiff's active files.

May 13, 1992: Dennis memo to Redmond attacking Plaintiff and CPS staff regarding their complaints.

May 19, 1992: Newkirk assigns Plaintiff to intake duty and begins audit of her cases.

May 26, 1992: Plaintiff's husband contacts Attorney General's office on her behalf, including complaints about the cover-up of the Cassandra case. Plaintiff is interviewed by Fred Lawless and provides further information regarding this issue.

June 3, 1992: Redmond contacts Dennis for information regarding complaints about the Cassandra case.

June 8, 1992: Investigatory conference with Wells, Newkirk and Plaintiff.

June 12, 1992: Plaintiff charged with falsification of records and gross neglect of duties and issued a 30-day suspension.

Under Fed. R. Civ. P. 50(a), Defendants are entitled to judgment as a matter of law only if "there is no legally sufficient evidentiary basis for a reasonable jury to find for [Plaintiff] on [the] issue" of intent. The Court of Appeals has the raw power to direct dismissal in accordance with Rule 50, where appropriate. Neely v. Martin K. Eby Construction Co., 386 US 317; 87 SCt 1072; 18 LEd 2d 75 (1967). Nevertheless, the same standard applies to the Court of Appeals, in rendering such a decision, as applies to the trial court. "The motion for judgment cannot be granted unless, as matter of law, the

opponent of the movant failed to make a case and, therefore, a verdict in movant's favor should have been directed." Montgomery Ward & Co. v. Duncan, 311 US 243, 251; 61 SCt 189; 85 LEd 147 (1940). As this Court has noted:

> It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of a particular inference or conclusion drawn by the jury. It is the jury, not the Court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. * * * That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

Tennant v. Peoria and Peking Union Railway Co., 321 US 29, 35; 64 SCt 409; 88 LEd 520 (1944).

This is not a case in which "there can be but one reasonable conclusion as to the verdict," and that conclusion is adverse to Ms. Crawford's position. Anderson v. Liberty Lobby, Inc., 477 US 242, 250; 106 SCt 1505; 91 LEd 2d 202, 213 (1986). Plaintiff had a good work record, and had received very favorable evaluations, until her First Amendment-protected activity began.

The Court of Appeals expressly chose to disregard all of Plaintiff's speech after the December 19, 1991 meeting, but in doing so, engaged in a faulty exercise of logic. The Court of Appeals stated (Appendix A, p.4a):

> We note that the alleged retaliation began no later than April 1992, prior to certain statements by Plaintiff which she claimed were protected speech. Obviously, statements made after the commencement of retaliatory acts cannot form the basis for a claim for retaliation.

The record demonstrated several acts of retaliation by the Defendants after the date cited by the Court of Appeals, the last and most severe of which was the suspension without pay and removal of Betty Crawford from her position on June 12, 1992. The false investigatory conference which preceded the suspension was not held until June 8, 1992. The Court of Appeals should have considered all of Plaintiff's protected speech prior to those dates. In this case, as Betty Crawford continued to speak out, the Defendants escalated their acts of retaliation. Defendants' own, previous, unconstitutional conduct toward plaintiff is no basis to ignore the cause and effect of all subsequent retaliation, even if the defendants engaged in a graduated pattern of more serious retaliatory misconduct toward Plaintiff as she spoke out repeatedly.

In this particular respect, the Court of Appeals has placed itself at odds with the decision of the United States Court of Appeals for the Second Circuit in Bernheim v. Litt, 79 F3d 318, 324-25 (1996), where the Court stated that, although some of the Plaintiff's statements provided no basis for a First Amendment claim because the retaliation predated "her speaking out," subsequent, adverse conduct toward the Plaintiff could, and should be considered as the basis for such a claim (referring to "other alleged retaliatory acts set forth as occurring after the Plaintiff made the comments in question"). In this case, unlike McDonnell v. Cisneros, there was a "ratcheting up of"

Defendants' retaliatory acts. 84 F3d 256, 259 (7th Cir. 1996) (Posner, C.J.).

The Court of Appeals' express disregard of Plaintiff's speech after December 19, 1991 is contrary to the basic principle that questions regarding the causation between the speech and the retaliatory conduct are ones of fact for the jury. Connick v. Myers, 461 US 138, 148, fn.7; see also, Stern v. Shouldice, 706 F2d 742, 747 (6th Cir. 1983), cert den 464 US 993 (1983). The Court of Appeals improperly substituted itself as the fact-finder by concluding that the suspension and removal of Plaintiff from her position on June 12, 1992 could only have been retaliation for the December, 1991 speech, not the additional, protected speech that occurred on April 29, 1992, May 4, 1992 and late May/early June the same year.

The Court of Appeals did not reach the issues of qualified immunity, and punitive damages (raised by Defendants on appeal), and should be directed to revisit those upon remand.

CONCLUSION

For these reasons, Petitioner, Betty Crawford, respectfully asks that the Court grant certiorari.

Respectfully submitted,

/s/_____
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APPENDIX A

NOT RECOMMENDED FOR PUBLICATION

No. 94-2384

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY CRAWFORD, Plaintiff-Appellee,	)	
v.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
DENNIS BOOKER; VIRGINIA WILLIAMS; MICHIGAN DEPARTMENT OF SOCIAL SERVICES, Defendants,	)	
DONNA NEWKIRK-STEWART; LAWRENCE WELLS, Defendants-Appellants	)	

BEFORE: SUHRHEINRICH and SILER, Circuit Judges; CARR, District Judge.*

* The Honorable James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

94-2384
CRAWFORD v. BOOKER, et al.

PER CURIAM. Plaintiff, an employee at the Michigan Department of Social Services, sued four supervisory employees under 42 U.S.C. § 1983 for violations of her First and Fourteenth Amendment rights. Two defendants, Donna Newkirk-Stewart and Lawrence Wells, appeal the jury verdict in plaintiff's favor awarding her damages of $154,000. We **REVERSE**.

I.

Plaintiff was employed by the Michigan Department of Social Services ("DSS") as a Child Protective Services ("CPS") worker. On December 1, 1991, she received a complaint from a local hospital that a child was suffering from severe trauma resulting from sexual abuse by a parent. The child eventually died.

During the investigation, plaintiff became aware that the file on the abused child had been closed in October 1991 after an imcomplete investigation of a prior complaint. Plaintiff claims that the document indicating that the file had been closed was signed by defendants Newkirk-Stewart and Wells. Newkirk-Stewart was plainiff's supervisor, and Wells was the DSS section manager responsible for the CPS activities at issue. Plaintiff discussed the case with Newkirk-Stewart, who ordered the file placed under the assumed name of "Cassandra." Plaintiff ultimately prepared the file for transfer to another county because Cassandra's mother had moved.

Plaintiff became concerned about this incident and other problems she perceived at CPS, including staff shortages and increasing workload. With coworkers, plaintiff participated in a December 1991 meeting at which defendants Newkirk-Stewart and Wells were present. At the meeting, plaintiff expressed concerns about staffing shortages and a significant backlog of cases. Additionally, she noted that if certain problems were not corrected, "another tragedy" could occur, referring to the

Cassandra case.

On April 29, 1992, staff members sent a letter requesting another meeting, identifying plaintiff as the contact person. Also in April 1992, plaintiff began receiving criticism from Newkirk-Stewart about her job performance. Newkirk-Stewart took several files from plaintiff's desk without notifying plaintiff. Newkirk-Stewart kept three of the files as part of a surprise audit of plaintiff's work. There were no such audits of other staff members' files. On May 29, 1992, Newkirk-Stewart formally notified plaintiff that her entire caseload would be audited, and in the interim plaintiff would be reassigned as an intake worker. Wells participated in the review of plaintiff's files. Plaintiff notified the county DSS director and her union representative that Newkirk-Stewart's actions were a "continuation of the retaliatory acts."

Newkirk-Stewart thereafter notified plaintiff that there would be an investigatory conference regarding charges of falsification of agency records and gross neglect of duty. After the investigatory conference, plaintiff was issued a thirty-day suspension without pay. She was subsequently transferred to an adult community placement position, resulting in an $8,000 decrease in her annual salary.

Plaintiff brought this § 1983 action on September 11, 1992. After a five-day trial in May 1994, the jury returned a verdict against Newkirk-Stewart and Wells, awarding plaintiff $154,000. This appeal followed.

II.

Defendants claim that the district court erred by denying their motion for judgment as a matter of law asserting that plaintiff's speech did not relate to a matter of public concern and was therefore not constitutionally protected. The trial court denied the motion and instead submitted the question to the jury.

Defendants in effect make two assignments of error: (1)

the district court incorrectly denied its motion; and (2) the court then erroneously submitted the issue to the jury. We reach only the first argument because it is dispositive.

A state employee alleging adverse employment action in violation of the First Amendment must establish that: (1) the speech was constitutionally protected; and (2) the protected speech was a "substantial" or "motivating" factor in the decision to penalize the plaintiff. Stern v. Shouldice, 706 F.2d 742, 747 (6th Cir.), cert. denied, 464 U.S. 993 (1983).

The first element is an issue of law for the court to decide. Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Stern, 706 F.2d at 747. The second element is a question of fact for the jury to decide. Stern, 706 F.2d at 747; Hildebrand v. Board of Trustees, 662 F.2d 439, 443 (6th Cir. 1981), cert. denied, 456 U.S. 910 (1982).

The question of whether speech is protected is itself a two-step inquiry, and asks whether (1) the speech addresses a matter of public concern, and (2) the employer has an overriding state interest in efficient public service that would be undermined by the speech. Dambrot v. Central Mich. Univ.,55 F.3d 1177, 1186 (6th Cir. 1995); Meyers v. City of Cincinnati, 934 F.2d 726, 729 (6th Cir. 1991).

As an initial matter, we note that the alleged retaliation began no later than April 1992, prior to certain statements by plaintiff which she claims were protected speech. Obviously, statemetns made after the commencement of retaliatory acts cannot form the basis for a claim of retaliation. For example, plaintiff points to a discussion in late May 1992 with Fred Lawless of DSS, in which plaintiff spoke to Lawless about her belief that the Cassandra matter had been mishandled and the potential for future mishaps. This discussion occurred well after the initial audit of plaintiff's files and other alleged retaliatory acts, and thus cannot serve as the basis for her claim.

The only speech that predated the alleged retaliation and

arguably relates to a matter of public concern is ploaintiff's implicit reference to the Cassandra case at the December 1991 meeting. Plaintiff testified as follows about what was said at the meeting:

> I expressed my concern over the high level of stress in the unit; that because of the backlog of paper work and the fact that we were still short staffed, the amount of work coming in, that I was afraid that there may be another tragedy, another child dead or seriously injured because of the lack of proper resources that we had in the unit.

Plaintiff attempts to characterize her indirect reference to the Cassandra matter as protected speech on a matter of public concern. We disagree. We are not persuaded that plaintiff's offhand remark, made in the context of a meeting which focused primarily on staffing concerns internal to the agency, is sufficiently related to a matter of public concern to constitute protected speech. Mere tangential references to political, social or other community concerns cannot bring internal grievances into the realm of protected speech.

Absent a claim based on retaliation for protected speech, government officials have "wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendmment." Connick, 461 U.S. at 146. Because plaintiff can point to no protected speech that predated the alleged retaliation by defendants, we conclude that the district court incorrectly denied defendants' motion for judgment as a matter of law. Because this conclusion compels reversal, we need not consider the other factors necessary for plaintiff to establish liability or defendants' remaining arguments.

III.

The judgment of the district court is **REVERSED**.

FILED
JULY 25, 1996
LEONARD GREEN, Clerk

APPENDIX B

No. 94-2384

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY CRAWFORD, Plaintiff-Appellee v. DENNIS BOOKER; VIRGINIA WILLIAMS; MICHIGAN DEPARTMENT OF SOCIAL SERVICES, Defendants, DONNA NEWKIRK-STEWART; LAWRENCE WELLS, Defendants-Appellants.	)	**ORDER**

BEFORE: SUHRHEINRICH and SILER, Circuit Judges; and CARR, District Judge.**

** Hon. James G. Carr, United States District Judge for the Northern District of Ohio, sitting by designation.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has futher reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

FILED
SEPTEMBER 4, 1996
LEONARD GREEN, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY CRAWFORD, Plaintiff,	)	
	)	Case No.
v.	)	92-75480
	)	
BOOKER DENNIS, DONNA NEWKIRK-STEWART and LAWRENCE WELLS, Defenants.	)	**DECISION** Vol. V

JURY TRIAL

Proceedings had and testimony taken in the above-entitled matter before the Honorable BERNARD A. FRIEDMAN, United States District Court Judge for the Eastern District of Michigan, Southern Division, at U.S. Courthouse, 231 W. Lafayette, Room 235, Detroit, Michigan, on Tuesday, May 17, 1994, at approximately 9:00 o'clock a.m.

APPEARANCES:

DAVID J. KOTZIAN, ESQ.,
Appearing for the Plaintiff.

MARGARET A. NELSON, ESQ.,
Appearing for Defendant Dennis.

LAMONT WALTON, ESQ.,
Appearing for Defendants
Newkirk-Stewart and Wells

* * *

FREDERICK C. PRATT, CSR-2301 OFFICIAL COURT REPORTER

THE COURT: I see. And, Mr. Walton, you adopt the argument as to these issues?

MR. WALTON: Yes.

THE COURT: In this matter, the Court believes that there is a public aspect involved in this. The fact that it was union generated to some extent perhaps -- and I'm not making that as a finding of fact because it's not my job to make a fainding of fact, but I have to make some factual finding in relation to the issue, legal issue and so forth. I don't think that negates that I think there is a public aspect.

The Court believes it has to look at this matter, in these kinds of motions, in the light most favorable to the nonmoving party. And, though the Court may, if he were the finder of fact, may do something different, but that's not the test at this point.

But the Court believes, looking at it in the light most favorable to the nonmovintg party, there is at least an issue of fact that a reasonable jury could conclude.

As I say, without commenting on what may or may not happen, the Court will deny that aspect of the motion. And, Mr. Walton, you may argue the second part.

MR. WALTON: Thank you.

THE COURT: Which does not have any effect on

* * *

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY CRAWFORD, an individual, Plaintiff,	)	
	)	Case No.
v.	)	No. 92-CV-75480-DT
	)	
BOOKER DENNIS, DONNA NEWKIRK-STEWART, and LAWRENCE WELLS, in their individual and official capacities; jointly and severally, Defendants.	)	HON. BERNARD A. FRIEDMAN
	)	**JUDGMENT**

SOMMERS, SCHWARTZ, SILVER & SCHWARTZ, P.C.
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JUDGMENT

At a session of said Court held in the U.S. District Court, County of Wayne, State of Michigan

PRESENT: BERNARD A. FRIEDMAN
U.S. District Judge

THIS MATTER HAVING been tried before a jury, and the jury having reached a unamous verdict;

IT HS HEREBY ORDERED AND ADJUDGED as follows:

1. On Plaintiff Betty Crawford's claim under 42 USC §1983 against Defendant Donna Newkirk, judgment is entered in favor of Plaintiff in the amount of $77,000 plus interest, costs and attorneys fees to be determined by Court pursuant to Motion.

2. On Plaintiff Betty Crawford's claim under 42 USC §1983 against Defendant Lawrence Wells, judgment is entered in favor of Plaintiff in the amount of $77,000 plus interest, costs and attorneys fees to be determined by the Court pursuant to Motion.

3. On Plaintiff Betty Crawford's claim under 42 USC §1983 against Defendant Booker Dennis, judgment is entered in favor of Defendant together with costs to be determined by the Court pursuant to Motion.

4. On Plaintiff Betty Crawford's claim for defamation against Defendant Donna Newkirk, judgment is entered in favor of Defendant together with costs to be determined by the Court pursuant to Motion.

/s/ BERNARD A. FRIEDMAN
U.S. District Judge

A TRUE COPY
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

BY DEPUTY CLERK

FILED
MAY 25, 1994
CLERK'S OFFICE
U.S. DISTRICT COURT

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY CRAWFORD, Plaintiff,	)	
	)	Civil Action
v.	)	No. 92-CV-75480-DT
	)	
BOOKER DENNIS, et. al., Defendants.	)	HON. BERNARD A. FRIEDMAN

ORDER REGARDING POST-TRIAL MOTIONS

On November 10, 1994, this matter came before the court on various post-trial motions. A hearing was held and oral argument heard. For the reasons stated on the record,

IT IS ORDERED that defendants' motion to dismiss the complaint for lack of subject matter jurisdiction is denied.

IT IS FURTHER ORDERED that defendants' motions for judgment notwithstanding the verdict, for a new trial, to amend the judgment, and for remittitur, are denied.

IT IS FURTHER ORDERED that plaintiff's motion for attorney fees is granted in the amount of $36,345 (Thirty-Six Thousand Three Hundred Fort-Five Dollars).

IT IS FURTHER ORDERED that plaintiff's motion for costs is granted. Counsel indicated at the hearing that they will cooperate in calculating the taxable costs.

IT IS FURTHER ORDERED that plaintiff's motion for prejudgment interest is denied.

/s/ BERNARD A. FRIEDMAN
United States District Judge

Dated: NOV 14 1994
Detroit, Michigan

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BETTY CRAWFORD, Plaintiff,	)	
	)	Civil Action
v.	)	No. 92-CV-75480-DT
	)	
BOOKER DENNIS, LAWRENCE WELLS and DONNA NEWKIRK, Defendants.	)	HON. BERNARD A. FRIEDMAN

VERDICT FORM

I. **FIRST AMENDMENT CLAIM**

A. On Plaintiff's claim that Defendant violated her federal civil rights, we the jury find in favor of:

As to Defendant Donna Newkirk:
Plaintiff _X_ Defendant ___

As to Defendant Lawrence Wells:

Plaintiff _X_ Defendant ___

As to Defendant Booker Dennis:

Plaintiff ___ Defendant _X_

B. As to each Defendant that you found in favor of Plaintiff in Question IA, please state the amount of damages suffered by Plaintiff as a result of that Defendant's conduct:

Donna Newkirk	$ 32.000
Lawrence Wells	$ 32.000
Booker Dennis	$ 0

C. As to each Defendant that you found in favor of Plaintiff in Question IA, please state the amount of punitive damages to be assessed to that Defendant:

Donna Newkirk	$ 45.000
Lawrence Wells	$ 45.000
Booker Dennis	$ 0

II. **SLANDER CLAIM**

A. On Plaintiff's claim of slander against Defendant Donna Newkirk, we the jury find in favor of :

Plaintiff ___ Defendant _X_

B. If your answer to Question II.A. is in favor of the Plaintiff, please state the amount of damages suffered by Plaintiff as a result of the slander.

$ _____

END OF VERDICT FORM

/s/ _____
S. Fisher
JURY FOREPERSON

Dated: 5/19/94

APPENDIX G

CONSITUTION OF THE UNITED STATES

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT [1.]

Freedom of religion, speech and press; peaceful assemblage; petition of grievances

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX H

UNITED STATES SUPREME COURT RULE 14.1(i)(v)

42 § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District or Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunites secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)